TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 90.

THE UNITED STATES, APPELLANT,

vs.

WILLIAM G. MILLER.

APPEAL FROM THE COURT OF CLAIMS.

FILED AUGUST 26, 1907.

(20350)

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1 In the Court of Claims.

WILLIAM G. MILLER
v.
THE UNITED STATES. } No. 28123.

I.—Petition.

[Filed June 29, 1905.]

To the honorable the Court of Claims:

The claimant, William G. Miller, respectfully represents:

I.

That during all the times hereinafter mentioned the claimant was a lieutenant in the Navy, with more than fifteen years' service.

II.

From July 1, 1899, to March 3, 1900, he served under orders from the Secretary of the Navy as aid to Rear-Admiral Albert Kautz.

III.

He was paid at the rate of $2,400 a year, being the Navy pay of a lieutenant in the first five years after date of commission. He claims the Army pay of a captain at $2,340 a year, with the additional $200 a year and longevity increase allowed for service as aid by sections 1261 and 1262, R. S., as made applicable to the Navy by the act of March 3, 1899 (30 Stat. L., 1007).

2 IV.

The difference, amounting to $134.98, he claims.

No assignment or transfer of this claim, or of any part thereof or interest therein, has been made; and the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimant is a citizen of the United States. And the claimant claims the sum of one hundred and thirty-four dollars and ninety-eight cents ($134.98).

GEO. A. & WM. B. KING,
Attorneys for Claimant.

NOTE.—The power of attorney authorizing the presentation of this claim is on file in the Treasury Department.

DISTRICT OF COLUMBIA, *ss:*

William B. King, being duly sworn, deposes and says: I am one of the attorneys for the claimant in this case. I have read the above

petition, and the matters therein stated are true, to the best of my knowledge and belief.

WM. B. KING.

Subscribed and sworn to before me this 29th day of June, 1905.

[SEAL.] MARIE A. SEARLES,
Notary Public.

3 *II.—Traverse.*

[Filed April 19, 1906.]

In the Court of Claims of the United States, December term, A. D. 1906.

WM. G. MILLER
vs.
THE UNITED STATES. } No. 28123.

And now comes the Attorney-General, on behalf of the United States, and , answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

J. A. VAN ORSDEL,
Assistant Attorney-General.

4 *III.—Argument and submission.*

This cause was argued by Mr. George A. King and Mr. William B. King for the claimant, and by Mr. John Q. Thompson for the defendants, and submitted April 19, 1906.

5 IV.—*Findings of fact and conclusion of law and opinion of the court.*

[Filed May 7, 1906.]

WILLIAM G. MILLER.
v.
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT:

I.

The claimant, William G. Miller, entered the naval service as a naval cadet on October 1, 1881. From July 1, 1899, to March 2, 1900, inclusive, he was a lieutenant of more than fifteen years' service in the Navy.

II.

While on duty on the U. S. S. "Oneida" he received the following order:

"NAVY DEPARTMENT,
"*Washington, Sept. 16, 1898.*

"SIR: When the U. S. S. 'Oneida' is placed out of commission you will regard yourself detached from the command of that vessel, will proceed to San Francisco, Cal., and report to Commodore Albert Kautz, U. S. N., commander in chief of the Pacific Station, on the 10th proximo, for such duty as he may assign you on his flagship.

"Respectfully,

"JOHN D. LONG, *Secretary.*

"Lieutenant WILLIAM G. MILLER, U. S. N.,
"*Commanding U. S. S. Oneida.*"

He reported for duty to the commander in chief, Pacific Station, on board the U. S. flagship "Philadelphia," on October 15, 1898, and on the same day was assigned to duty on the personal staff of the commander in chief as flag lieutenant.

6 He continued to serve as flag lieutenant on the staff of Rear-Admiral Kautz until March 2, 1900, when he was detached and ordered to other duty.

During this period the personal staff of Rear-Admiral Kautz consisted of two officers, one (the claimant) designated as flag lieutenant and the other as flag secretary or clerk.

Rear-Admiral Kautz was at that time one of the nine higher numbers of the grade of rear-admiral.

III.

The duties of the officers constituting the personal staff of a rear-admiral have been shown by the following letter and other evidence to be as therein described:

"NAVY DEPARTMENT,
"*Washington, April 25, 1905.*

"SIR: Rferring to your No. 34534–RSJ, of April 22d, relative to the duty of Lieutenant L. M. Garrett, U. S. Navy, while on the personal staff of Rear-Admiral Kautz:

"2. The Department's former letter of the 18th instant, in reply to the letter from the Treasury Department, dated the 15th idem, on this same matter is based upon the following considerations:

"3. The Department desires to point out, in considering the question of who are and who are not aids of a flag officer, the facts as follows:

"4. Flag officers of the Navy have assigned to them a certain number of officers on their personal staffs, who, in naval parlance, have been entitled as follows, namely: Flag lieutenant (usually one); the flag secretary (usually one); and as many aids as are necessary to the

work of the commander in chief. As in the case of a general officer of the Army, these officers, including the flag lieutenant, are, in every acceptation of the word, aids for assisting the commander in chief in the performance of his duties. The number of officers thus assigned is limited only by the actual necessities of the case. In very large fleets, where the staff work is especially heavy, two or three so-called aids may be necessary in addition to the flag lieutenant and the secretary. They are all, from flag lieutenant to the lowest aid in point of rank, aids in every sense of the term to the flag officer. The senior aid of the flag officer is, in ninety-nine cases out of a hundred, chosen by the flag officer personally as a flag lieutenant. The term 'flag lieutenant' in itself by no means indicates all the duties which the officer so appointed performs. Different flag officers distribute their duties among the members of the personal staff in different ways. Some have charge of one thing, or set of things, another has charge of other things; but, from time immemorial, in other naval services as well as our own, it has been customary to term the senior aid of the flag officer the 'flag lieutenant' because, from time immemorial also, that aid has been placed in charge, as one of his duties only, of the signal work of the fleet or squadron in which he may happen to be serving. This duty forms only a small part of his general duties. As stated before, he is chosen personally for his qualities in nearly all cases by the flag officer, because he is to have, as the senior member of his staff, the most confidential relations with his flag officer. It is cus-
7 tomary whenever the flag officer leaves his vessel, officially or socially, to be accompanied by his flag lieutenant. He is also sent on confidential duty by the flag officer to captains of vessels in the fleet, or to carry out some particular duty where his presence as a representative of his flag officer gives the message or intelligence from the flag officer an officia character which could not otherwise be given. This applies particularly in his duties which take him to foreign flag officers or captains, where he is always received as the direct representative of his own flag officer. It will be seen from this that the flag lieutenant is in every respect the aid, peculiarly, of the flag officer, and his duties, in comparison with those of an aid to a general officer, more nearly conform to those performed by a military aid than do those of any other officer on the personal staff of a flag officer.

"5. There are very good reasons why the aids to a general receive extra compensation for their services while on the staff of a general. They are required at all times to present the best possible appearance personally, demanding extra expenditures in the way of uniforms, etc., which all other officers are not required to make. They are required also to travel with the general, and consequently meet with many expenses that they would not otherwise have and for which no adequate bills could be rendered for proper settlement officially. A flag lieutenant stands in exactly the same relations to a flag officer. As the personal representative or aid of the flag officer, he is also required to maintain his uniforms in the very best condition. He

also has a great many expenses when with the flag officer which can not be met by rendering bills constantly for official settlement.

"6. In the same manner, as stated in regard to the flag lieutenant, flag secretaries, now usually termed 'aids,' are aids to their flag officers as much as any aid is to a general officer of the Army appointed to perform similar duties. The other aids of a flag officer or a general officer of the Army are simply termed 'aids' because there is nothing particular in their duties which tends to furnish a definite word other than that of 'aid' to describe them; but the Department desires to point out particularly that the officers of the personal staff of a flag officer of the Navy are in every respect as much aids to that flag officer as are the aids of a general officer of the Army, the only difference being that, as pointed out in the case of a flag lieutenant and sometimes the flag secretary, certain duties have from time immemorial served to give them a title which has been perpetuated to the present day, and of all the aids to a flag officer no one officer performs duties which more nearly correspond to those of an aid to a general officer of the Army than a flag lieutenant.

'Lieutenant Garrett received no orders to duty as aid to Rear-Admiral Kautz other than the order dated March 7, 1900.

"Very respectfully,

"PAUL MORTON, *Secretary.*

"The AUDITOR FOR THE NAVY DEPARTMENT."

IV.

The customary duties of an aid to a major-general in the Army are of a personal nature; he accompanies and assists the general on visits of ceremony and official social occasions; he represents the general in extending official courtesies to visiting officers in the Army and
8 Navy; he performs the duties of signal officer in the absence of the officer regularly assigned to that duty; he has charge of the enlisted men detailed at headquarters.

V.

From July 1, 1899, to March 2, 1900, claimant was paid at the rate of $2,400 a year, being the pay at navy rates of a lieutenant in the first five years after date of commission.

If he is held to be entitled to an additional $200 a year with longevity increase on the same for service as flag lieutenant or aid to Rear-Admiral Kautz, the amount due is $134.45, shown by the reply of the Auditor for the Navy Department, as follows:

Army sea pay of a lieutenant, after fifteen years' service from July 1, 1899, to March 2, 1900, eight months and two days, at $2,340 per annum	$1,573.00
Aid's pay for same period at $200 per annum	134.45
Longevity on aid's pay for same period (30 per cent), $60	40.33
	1,747.78
Less pay received as lieutenant first five years, at $2,400 per annum for the above period	1,613.33
Difference	134.45

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is entitled to recover judgment of and from the United States in the sum of one hundred and thirty-four dollars and forty-five cents ($134.45).

OPINION.

HOWRY, J., delivered the opinion of the court:

This is one of a class of cases ruled adversely to the material contentions of the plaintiff in a similar case by the accounting officers of the Treasury, and deriving its importance from the rule adopted as to the status of a flag lieutenant claiming pay as an aid to a rear-admiral, as well as from the method of computing this pay if his status should be determined to be that of an aid. (Comp. Dec. Mss.)

The claim is based on that clause of section 1261 of Revised Statutes which makes the following provision:

"The officers of the Army shall be entitled to the pay herein stated after their respective designations: * * *

"Aid to major-general: $200 a year, in addition to pay of his rank."

This clause applies to an aid of a rear-admiral under and by virtue of section 13 of the navy personnel act of March 3, 1899 (30 Stats. L., 1007). But the question here is: Was plaintiff an aid within the meaning of the statute?

Plaintiff's contention is that, though he was a flag lieutenant, he was assigned to duty on the personal staff of the commander in chief as an aid; that the term "aid" is used in two senses in the Navy, one in a generic sense and meaning the officers constituting the personal staff of a flag officer—and another in a narrower sense; that is, that the aids additional to the flag lieutenant and flag secretary are aids to a rear-admiral in the same sense as the officers on the personal staff of a major-general within the meaning of section 1261 of the Revised Statutes. Plaintiff undertakes to fortify his contention by what he says is departmental construction and by a decision of this court affirmed in appeal by the Supreme Court. (Crosley *v.* United States, 38 C. Cls. R., 82; 196 U. S., 327.)

Defendants contend, on the authority of Treasury rulings, that the additional pay is allowed to "aids" who are designated as such, and that the extra compensation given in one case in this court was allowed only because that officer had been specifically designated as "aid" to a rear-admiral. It is denied that the courts have settled the question, and also denied that judicial construction can bring the claim of a flag lieutenant as an aid to a rear-admiral within the letter of the regulations and statutes.

The decision of the Secretary of the Navy that officers, including

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flag lieutenants, are "aids" in every sense where assisting the commander in chief for the performance of his duties is a departmental construction not controlling, but of great weight. But the decision of the courts in Crosley's case (supra) need only be considered to determine the contention.

It is true that in the case of Crosley that officer was specially designated as "aid," and that here there was no such previous designation. But Crosley was a flag secretary. That fact was in the record. The officer in this case was a flag lieutenant when the service as "aid" was rendered. There is no such office in military or naval life as "aid." If there be no such distinctive office, there could not be a separate officer for the discharge separately of these aids' duties. The duties of an aid are performed by some officer, either by an order designating him to serve as an aid or by actually calling him in to serve as such on the staff of the commander in chief. The duty performed by this officer was a corresponding duty to the duty performed by an army aid, and we think it is too narrow a construction to say that a flag lieutenant who actually served as an aid to the commander and performed the same duty as an army aid should not be considered for purposes of pay also to be an aid and entitled to the pay. We are unable to see any distinction between this and the ruling of this court and the Supreme Court in the Crosley case, and we must hold that the case is ruled by that.

In computing the amount of pay this flag lieutenant is entitled to claim as an aid it is contended by the defendants that it has not been shown whether the rear-admiral under whom the claimant served during the time covered by this claim was a rear-admiral in the 9 lower or 9 higher numbers. The findings dispose of this contention. Rear-admirals are divided into two classes for the purpose of pay: The 9 higher being paid according to corresponding rank in the Army, that of major-general, while the 9 lower receive only the pay of a brigadier-general in the Army. The rear-admiral, under whom the plaintiff served as aid, was at the time of the service one of the 9 higher numbers of the grade of rear-admiral. (Prov. sec. 7, personnel act.) This proviso has been held, properly, we think, to be a limitation on the pay of the rear-admirals themselves, but does not affect that of their aids.

A more serious contention arises from the argument that the longevity increase of this officer be calculated upon the pay which the officer received, excluding the pay he received as an aid.

10 The following amendment was enacted June 30, 1882, to wit:

"That from and after the 1st day of July, 1882, the 10 per centum increase for length of service allowed to certain officers by section 1262 of the Revised Statutes shall be computed on the yearly pay of the grade fixed by sections 1261 and 1274 of the Revised Statutes." (22 Stat. L., 118.) This statute was designed to cure a defect in the former statutes under which longevity pay was in a manner compounded. During his first five years the officer received

his grade pay as fixed by section 1261 of the Revised Statutes. During his second five years he received that grade pay increased by 10 per cent thereof. During his third five years he received not only the grade pay and two 10 per cent increases thereon, but also 10 per cent increase on the first longevity increase received during the previous five years. The amendment of 1882 was evidently designed to restrict computation of the longevity increase to the grade or basic rates of pay fixed by section 1261 without also computing them upon the previous longevity increases of which the officer was already in receipt. It would seem that the term "yearly pay of the grade" as used in this amendment was employed by Congress as synonymous with "grade pay," and there is great force in the contention of plaintiff that the right to longevity pay on the aids' pay fixed by section 1261 would be taken away by the act of 1882 by the construction claimed by defendants. This would bring about a result that Congress in legislating to take away one thing which it had especially in mind inadvertently took away another not designed to be taken away.

That aids' pay is a proper portion of the claim seems to be in accordance with the spirit of the decisions of this court in Irwin v. United States (38 C. Cls. R., 101) and United States v. Mills (197 U. S., 223) construing the term "pay proper." This phase of the matter is directly supported by the decision in Crosley (supra). The judgment in that case included longevity pay on the flag secretary's pay as aid, and Mr. Justice Day concludes his opinion in that case by allowing the sums claimed in the petition and carried into the judgment except as to mounted pay. Notwithstanding this, defendants contend that the matter should be reviewed because it was a matter of inadvertence.

The contention now made was not raised by the United States in Crosley's case either in this court or in the Supreme Court. The computation was made on Crosley's claim just as the officer's pay as aid was entitled to be considered. The amount of the officer's pay as an aid was estimated as a part of his "pay proper," as much as the longevity increase, as long as he served as an aid. This is the liberal view. At the same time it can not be denied that the statute is susceptible of a restrictive construction that will exclude the officer from having the compensation growing out of his services as an aid taken into the account in computing the pay. And different minds might reach different conclusions about the matter if it were a question of first impression.

But it is not a matter which this court can change, since the question is settled in Crosley's case by the Supreme Court, even if we were disposed to adopt a different rule.

Judgment will be entered for plaintiff in the sum of $134.45, as prayed for in the petition.

11 V.—*Judgment of the court.*

WILLIAM G. MILLER
vs.
THE UNITED STATES. } No. 28123.

At a Court of Claims held in the city of Washington on the 7th day of May, 1906, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimant and do order, adjudge, and decree that William G. Miller, the claimant, do have and recover of and from the United States the sum of one hundred and thirty-four dollars and forty-five cents ($134\frac{45}{100}$).

BY THE COURT.

12 VI.—*Application for appeal.*

WILLIAM G. MILLER
vs.
THE UNITED STATES. } No. 28123.

From the judgment rendered in the above-entitled cause on the 7th day of May, 1906, in favor of claimant, the defendants, by their Attorney-General, on the 21st day of May, 1906, make application for, and give notice of, an appeal to the Supreme Court of the United States.

J. A. VAN ORSDEL,
Assistant Attorney-General.

Filed in open court May 21, 1906.

13 VII.—*Motion for an "Order of allowance of appeal."*

Comes now the defendant, by its Attorney-General, and represents to the court that judgment was rendered by this court in favor of the claimant and against the defendant in the above-entitled cause on May 7, 1906; that on May 21, 1906, defendant filed its notice and application for appeal in open court, but did not ask that said appeal be allowed.

Defendant now respectfully prays for an order of allowance of appeal in said cause to the Supreme Court of the United States.

J. A. VAN ORSDEL,
Assistant Attorney-General.

Ordered: That this appeal be allowed as prayed for.

STANTON J. PEELLE,
Chief Justice Court of Claims.

July 28, 1906.

14 Court of Claims.

WILLIAM G. MILLER
v.
UNITED STATES. } No. 28123.

I, John Randolp, assistant clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law and opinion of the court; of the judgment of the court; of the application for appeal to the Supreme Court of the United States and allowance of same.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 15th day of August, 1906.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) File No. 20350. Court of Claims. Term No. 90. The United States, appellant, vs. William G. Miller. Filed August 22, 1906. File No. 20350.

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In the Supreme Court of the United States.

OCTOBER TERM, 1907.

THE UNITED STATES, APPELLANT,
v.
WILLIAM G. MILLER. } No. 90.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

From July 1, 1899, to March 2, 1900, inclusive, the appellee, William G. Miller, was a lieutenant in the United States Navy of more than fifteen years' service. During said period from July 1, 1899, to March 2, 1900, he was assigned to and performed duties as flag lieutenant on the personal staff of Rear-Admiral Kautz.

The claimant contends that by reason of his duties during said time as flag lieutenant he should receive additional compensation at the rate of $200 a year, with longevity increase on the same, as shown in finding 5 (R., p. 5).

This contention is made on the theory that notwithstanding Lieutenant Miller was not designated

as an "aid," he was designated by the Secretary of the Navy as flag lieutenant on the staff of Rear-Admiral Kautz and should be considered as an "aid" during the time of his service as flag lieutenant.

THE STATUTES.

Section 1098, Revised Statutes, provides in part as follows:

> Each major-general shall have three aids, who may be selected by him from captains or lieutenants of the Army.

Section 1261, Revised Statutes, in fixing the pay of officers of the Army, provides in part as follows:

* * * * *

> Aid to major-general: Two hundred dollars a year in addition to pay of his rank.
>
> Aid to brigadier-general: One hundred dollars a year in addition to pay of his rank.

The opening clause of section 13 of the act of March 3, 1899, commonly termed the "Navy personnel act," provides as follows:

> That, after June thirtieth, eighteen hundred and ninety-nine, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army.

Under the foregoing statutes this court, in the case of *United States* v. *Crosley* (196 U. S. R., p. 327), affirmed the judgment of the Court of Claims, wherein

the claimant was allowed extra pay as "aid" to a rear-admiral, corresponding with the extra pay allowed an "aid" to a major-general in the Army.

THE ISSUES.

The claimant alleges, as shown in the statement, that, notwithstanding he had not been designated as "aid" to Admiral Kautz, he was, nevertheless, an "aid" and performed the duties of such official.

He further alleges that he is entitled to longevity increase on his pay as "aid" during said term of service.

The Government contends that the claimant is not entitled to the extra compensation due an "aid" to a rear-admiral, for the reason that he was not such "aid" and had not been designated as an "aid" to a flag officer during the time of his service as flag lieutenant.

The Government further contends that the extra pay allowed an "aid" to a rear-admiral should not form any part of the basis in computing the officer's longevity increase.

ARGUMENT.

Aids to rear-admirals at the time the alleged service was performed were appointed under the Naval Regulations, as follows:

Sec. 343. The chief of staff, flag lieutenant, clerk, and *aids* shall constitute the personal staff of a flag officer.

Sec. 344. (1) A flag officer, when ordered to a command afloat, may, at his discretion, nominate

to the Secretary of the Navy a line officer not above the rank of lieutenant to serve on his staff as flag lieutenant, and a line officer not above the rank of lieutenant junior grade to serve as clerk.

(2) The flag lieutenant, in addition to his other duties, shall be the fleet signal officer.

Sec. 345. (1) A flag officer may select any officer of his command to serve as flag lieutenant or clerk, provided his grade accords with the rules laid down in article 344.

(2) He may also, when necessary, select other line officers *junior to the flag lieutenant to serve on his personal staff as aids*, but shall not assign Naval cadets to such duty.

(See sections 343 to 345, inclusive, p. 76, Regulations for the Government of the Navy of the United States, 1896.)

In the case of Crosley, heretofore cited, that officer was specifically designated as *aid* (R.,p. 7).

It will be seen by section 344 of the Navy Regulations that the personal staff of a flag officer is composed of, first, the chief of staff; second, flag lieutenant; third, clerk, and, fourth, aids, and each of these positions is separate and distinct.

Furthermore, the regulations provide from what source these various officials shall be appointed. In order to fill the position of flag lieutenant the flag officer must nominate to the Secretary of the Navy a line officer *not above the rank of lieutenant;* and in order for an officer to be eligible to appointment to serve as clerk the officer must not hold a rank above that of lieutenant junior grade. Furthermore, the

flag officer in selecting his *aids* must select the same from line officers who rank *junior to the flag lieutenant.*

It would seem that language could not be plainer than that used in the Navy Regulations, to the effect that flag lieutenant, clerk, and aids, whatever number they may be, on the personal staff of a rear-admiral are separate and distinct positions.

In addition thereto the second paragraph of section 345 expressly precludes this claimant from being an aid to a rear-admiral, for the reason that the claimant was a flag lieutenant holding the rank of *lieutenant* in the Navy, and, as we have seen by the foregoing regulations, aids to rear-admirals must be selected from officials holding *lower* rank than that held by flag lieutenants.

In the Crosley case there was no controversy as to whether the claimant had been designated as aid. He was an aid and admitted to be such, but the question there for the court to determine, and which the court did determine, was whether an aid to a rear-admiral was entitled to the extra compensation given by statute to an aid to a major-general. It is true that Crosley held the position of flag secretary, but that fact in no way changed the issues and has no bearing whatever in the case now before the court. The issues are entirely different. In the case at bar, as we have shown, the first question to be determined is whether the claimant was an *aid* to a rear-admiral. We have shown that he was not such official, and, indeed, that he could not be under the regulations providing for aids to rear-admirals.

Section 1098, Revised Statutes, provides that each major-general shall have three aids, and under the salary clause each of these aids is entitled to the extra compensation of $200 a year. No other officials on the staff of a major-general may be appointed as aids and draw this compensation other than the three who are thus designated. Under claimant's contention, however, all those officials mentioned in article 343 of the Navy Regulations would be entitled to compensation as aids, namely, the chief of staff, flag lieutenant, clerk, and an unlimited number of aids as the flag officer may at his discretion nominate to the Secretary of the Navy. We do not think it was the intention of Congress, as expressed in the opening clause of section 13 of the so-called navy personnel act, to grant to all these officers who might be thus considered aids to a flag officer the extra compensation which is given to but three aids to a major-general. A more reasonable construction of the statute is that a rear-admiral shall have the same number of *aids* as and *no more* than that given by law to a major-general. The fact that the rear-admiral on whose staff the claimant served did not have a full supply of aids in no sense changes the principle for which we contend. Paragraph 347 of the Navy Regulations, 1896, page 77, provides in part as follows:

> The duties of the members of the personal staff other than those prescribed in these regulations shall be entirely regulated by the chief of staff, subject to the flag officer.

It may be in the case at bar that the claimant, while holding the position of flag lieutenant, was directed by the chief of staff to perform certain duties usually performed by aids to the flag officer, but this assignment of duties in no way constitutes claimant an "aid" within the statutes and regulations providing for aids in the Army and Navy.

LONGEVITY INCREASE.

The claimant is asking that his pay as aid be added to the pay of his rank and the percentage of longevity increase computed upon the whole amount. In making this demand he asks that an aid to a rear-admiral shall be specially favored over an aid to a major-general. The additional pay allowed to officers in the Army who act as aids has not been and is not now any portion of the basis in computing the officers' longevity increase. We may cite the Paymaster-General's Manuals of the Army for the years 1871, page 47; 1884, page 38; 1896, page 30; 1898, page 38; and 1905, paragraph 11, reads as follows:

> An aid to a major-general is allowed $200 per year in addition to the pay of his rank, and an aid to a brigadier-general is allowed $150 per year in addition to the pay of his rank not included in computing the service increase.

EQUALIZATION OF PAY.

In the case of *United States* v. *Thomas* (195 U. S., 420) the court discussed the reasons for the provision made in the opening clause of section 13 of the navy

personnel act with reference to the equalization of pay between navy officers and army officers, and in so doing commented upon the fact that prior to the passage of said act some of the navy officers did not receive the same pay as officers of corresponding rank in the Army. Mr. Justice Brown, in speaking for the court, said:

> To remove this dissatisfaction Congress passed the navy personnel act, assimilating the pay of navy officers to army officers of corresponding rank.
>
> * * * * *
>
> The intention of Congress was evidently to put officers of the Army and Navy on the same footing with respect to their general pay, and to make the act prospective in its application to future legislation.

In the Crosley case Mr. Justice Day, in speaking for the court, said, with reference to the navy personnel act:

> Which act, while providing against a reduction of then existing pay of commissioned officers of the Navy, undertook to equalize the pay of naval officers (theretofore generally below that of officers of corresponding rank in the Army) with that of officers of the Army of equal rank.

And further in the opinion the learned justice said:

> The sum of $200 is allowed to an aid to a major-general in addition to the regular pay of his rank. It is allowed as payment for the additional service imposed. Bearing in mind

> the purpose of the act to give the same compensation to corresponding officers of the Army and Navy, and that it is expressly provided that officers of the Navy shall receive the same pay and allowances, except for forage, as are or may be provided by law for officers of the Army of corresponding rank, we think it does no violence to, but rather carries out, the purpose of Congress to construe this section so as to give to an aid of a rear-admiral, in addition to the regular pay of his rank, pay similar to that allowed an aid to a major-general.

Here we have the highest authority construing the opening clause of section 13 of the navy personnel act as the intention of Congress to equalize the pay of the officers of the two branches of the military service.

But if claimant is correct in his contention Congress has *unequally* increased the pay of naval officers serving as aids above the pay granted to aids of army officers. Under his contention the naval aid would receive longevity increase on his pay as aid, while in the case of an aid to an army officer this longevity increase on his pay as aid is denied by the accounting officers of the War Department; and this construction of the statute denying longevity increase on pay as aid to an army officer is of long duration, the evidences of which are found in the Paymaster's Manuals, which we have cited.

This court having determined in the Crosley case that it does no violence to but rather carries out the

purpose of Congress to construe the opening clause of section 13 so as to give an aid to a rear-admiral pay similar to that allowed an aid to a major-general, is now called upon to determine whether said opening clause disturbs the equalization of pay intended by Congress and gives an aid to a rear-admiral *greater* pay than that allowed by statute to an officer of equal rank serving as aid to a major-general.

THE MILLS AND TYLER CASES.

Claimant's counsel in their able reply brief in the court below contended that the question was settled in the cases of *United States* v. *Mills* and *United States* v. *Tyler*. In the case of *United States* v. *Mills* (197 U. S., 223) the question was upon what basis the sum of 10 per cent increase of compensation to officers serving beyond the continental limits of the United States should be computed. And in the case cited the court construed the term "pay proper" in connection with the term "current yearly pay" as construed in the case of *United States* v. *Tyler* (105 U. S., 244).

Revised Statutes, section 1262 provides:

> There shall be allowed and paid to each commissioned officer below the rank of brigadier-general including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years of service.

These provisions were construed in the case of *Tyler*, and the question was whether the longevity increase should be computed upon the total pay received by an

officer, including previous longevity increases; thus computing one longevity increase upon another. The court below held that it was to be so computed, and that no other construction would satisfy the terms of the statute "current yearly pay;" and this decision was affirmed by this court.

In the case cited it will be seen that the court applies the term "regular salary" to the salary as fixed by section 1261, which said regular pay plus the increase pay, in the opinion of the court, constituted the officers' "current yearly pay." It may be pertinently added that immediately after this decision Congress provided as follows:

> That from and after the first day of July, eighteen hundred and eighty-two, the ten per centum increase for length of service allowed to certain officers by section twelve hundred and sixty-two of the Revised Statutes shall be computed on the *yearly pay of the grade* fixed by sections twelve hundred and sixty-one and twelve hundred and seventy-four of the Revised Statutes. (See 22 Stat. L., p. 118.)

Neither of the cases cited by claimant furnish any assistance to this court in determining the issue at bar. It certainly will not be contended by claimant that the $200 a year in addition to pay of his rank, granted by section 1261, Revised Statutes, to an aid to a major-general, is any portion of the yearly pay of the officers' grade. "Pay of the grade" and "pay of the rank" are synonymous terms, and it will be observed that the statute in making provision for the

extra pay to aids uses the term "in addition to pay of his rank." Officers of different rank may be, and indeed are, selected and designated as aids, and they may serve but a small portion of the year. The extra pay, therefore, allowed to an officer who may serve as aid can in no sense be considered as a part of the yearly pay of his rank.

THE CROSLEY CASE.

The claimant further contends that the method of computing the longevity increase was settled and disposed of in the case of Crosley heretofore cited. With this contention we take issue. There were but two questions discussed by this court in the case of Crosley: First, was the claimant entitled to the extra $200 the same as allowed an aid to a major-general in the Army? Second, was he entitled to mounted pay allowed to a major-general's aid? The question of whether Crosley was entitled to longevity pay on the additional pay as an aid is nowhere referred to in the opinion.

It is true that judgment was given for the longevity increase based on the additional pay, but this seems to have been an inadvertence. The matter was not discussed by counsel for the claimant nor by counsel for the Government. The figures given by the accounting officials which entered into the judgment of the court seem to have been based upon the principle of allowing longevity increase upon the officer's pay as an aid, but, as we have stated, neither counsel nor

the court seem to have detected this error in computation, and therefore we contend that the Crosley case in no sense settles the question.

In the case of *United States* v. *Philbrick* (120 U. S., 52) the question was the validity of General Order No. 75, dated Navy Department, May 23, 1866, allowing 33⅓ per cent additional pay to officers of the Navy. The claim was for credit for prior service under the act of March 3, 1883 (22 Stat. L., 473), and was made up by the Auditor allowing credit for prior service and 33⅓ per cent additional on the increase.

The Second Comptroller disallowed the 33⅓ per cent additional on the ground that the Secretary of the Navy was not authorized to grant such increase.

The Supreme Court sustained the validity of the order and gave judgment for the whole amount, including the 33⅓ per cent additional.

The accounting officers, however, held that the court did not in Philbrick's case pass upon the question of allowing the additional pay under said order on the increase pay accruing by crediting the officer with his prior service, and therefore disallowed $214.88 in the claim of Allen. The Court of Claims in the case of *Allen* v. *The United States* (22d C. Cls. R., 300), through Judge Davis, said, at page 305:

> We are therefore of opinion that the question was considered by the Supreme Court and that they reached the conclusion that the legality of the general order once established both items of the claims should be allowed.

The Allen case was appealed to the Supreme Court (103 U. S., p. 345), and Mr. Justice Harlan, speaking for the court, said (p. 347):

> It is possible that the findings in the Philbrick case, although very meager and obscure, involve the question now presented, but no such point was suggested by counsel and it was not by this court. The only question actually disputed in that case was as to the validity of General Order No. 75, and this court was led to believe that if that order was sustained as a proper exercise of authority by the Secretary of the Navy, the affirmance of the judgment below would follow as a matter of course.

The court then proceeded in the Allen case to consider and pass upon the question there raised which it was contended had not been discussed in the Philbrick case. Here, then, is authority for the court to consider the question of the basis of longevity increase in the case at bar irrespective of the fact that it was allowed in the judgment in the Crosley case.

FINDING 3 OF THE COURT OF CLAIMS.

The third finding of fact made by the court below consists of a letter by the Secretary of the Navy to the Auditor for the Navy Department dated April 25, 1905. This communication sets forth the duties of the officers constituting the personal staff of a rear-admiral. With all due respect to the high official, the Secretary of the Navy, we insist that any

custom or usage that may exist in the Navy Department with reference to the duties of its various officials can not have and does not have the effect of enlarging the scope or extending the terms of an express statute.

Claimant's contention that he was an aid to a rear-admiral in a generic sense, if not specially designated as an aid, is not sufficient to entitle him to the pay allowed an aid to a rear-admiral. The statute provides certain compensation for aids to a major-general and a brigadier-general and makes further provision as to the manner of their appointment. The extra pay given by the law to aids specially appointed as such is not extended to officers of other designations who perform the duties of aids to army officers. The claimant can receive the benefit of the statute allowing compensation to aids to army officers only by virtue of the opening clause of said section 13 of the navy personnel act. Said act does not widen the scope of section 1261. It is just as limited and restricted in its operation as the statute which it seeks to apply to naval officers. It gives the same compensation and allowances, except forage, to naval officers as sections 1261 and 1262, as amended by the act of July 1882, give to army officers, and it is commensurate with those sections.

In determining a naval officer's pay under said section 13, the army officer's pay is a standard and the compensation of a naval official must not measure beyond that standard as furnished by Congress.

This claimant was no more an aid to a rear-admiral than many other officials, such as fleet paymaster, fleet engineer, fleet surgeon, all of which officials assist the commanding officer in the discharge of his duty as commander in chief of a station. They are aids in a generic sense, but not in the specific sense that entitles them to the extra compensation given to the aids to army officers by section 1261, Revised Statutes.

The amount of the judgment in this case is small, but the principle involved in each of the issues herein presented is far-reaching, inasmuch as it affects all officers in the Navy who are subject to be called upon to do duty on the personal staff of a flag officer. We respectfully submit that the judgment of the court below should be reversed and the cause remanded with directions to dismiss the petition.

J. A. VAN ORSDEL,
Assistant Attorney-General.

JOHN Q. THOMPSON,
Special Attorney.

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IN THE

Supreme Court of the United States.

October Term, 1907.

THE UNITED STATES, *Appellant*,
v.
WILLIAM G. MILLER. } No. 90.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

I. STATEMENT OF THE CASE.

The claimant, William G. Miller, a lieutenant of more than fifteen years' service in the Navy, served as flag lieutenant on the personal staff of Rear-Admiral Kautz from prior to July 1, 1899, to March 2, 1900. During this period the personal staff of Rear-Admiral Kautz consisted of two officers, one the claimant, designated as flag lieutenant, and the other as flag secretary or clerk (Findings I, II, Record, pp. 2, 3). For his services during this period he has been paid only at the rate appropriate to his lineal rank as a lieutenant in the Navy (Finding V, 1st paragraph, Record, p. 5). He claims in this suit to recover pay at the additional rate of $200 a year with longevity increase for fifteen years' service in the Navy thereon (Finding V, 2d paragraph and tabular statement, Record, foot p. 5).

The claim for the $200 additional pay is based upon the provision of section 1261 of the Revised Statutes allowing to officers of the Army, among other rates of pay, the following:

"Aid to major-general: $200 a year, in addition to pay of his rank."

The claim for longevity increase on pay as aid is based upon section 1262 of the Revised Statutes. These statutes apply to officers of the Navy by virtue of section 13 of the Navy Personnel Act, 30 Stat. L. 1007.

These statutes, with others applicable to the questions involved, are quoted in full in the opinion of this court in *United States* v. *Crosley*, 196 U. S. 327, 332, 333. That decision is claimed by counsel for the claimant (appellee) to be decisive of the present controversy in both its branches. For the United States it is contended:

1. That the services rendered by the appellee in the present case were not of the kind for which section 1261 allows an army officer $200 a year additional pay while serving as an aid to a major-general.

2. That longevity increase on the additional pay as aid is not within the terms of Revised Statutes, section 1262, and its amendment of June 30, 1882, 22 Stat. L. 118, quoted in brief for the United States, p. 11, and the inclusion of such longevity pay in the judgment in the *Crosley* case was through inadvertence (brief for United States, p. 12).

Embodied in the findings of the Court of Claims is a letter of the Secretary of the Navy found by the court to be a correct description of the duties of the flag lieutenant and other officers on the personal staff of a rear-admiral (Finding III, Record, pp. 3 to 5). The court also finds the nature of the duties of aids to major-generals in the Army (Finding IV, p. 5).

The Court of Claims decided in favor of the claimant on both branches of the claim; allowing $200 a year for services as aid and a longevity increase of ten per cent thereon for each five years of service.

The opinion of the court (Record, pp. 6–8) was delivered by Judge Howry. The case is reported 41 C. Cls. 400. The United States appealed; and the Attorney-General now questions the correctness of the judgment in both its branches.

II. BRIEF OF ARGUMENT.

Appellee Entitled to Pay as Aid.

Counsel for the United States claims that as the appellee in this case was designated as "flag lieutenant," he was not an "aid" to the Rear-Admiral and therefore can not receive the special pay allowed by law to an aid to a major-general in the Army.

Flag Lieutenant is an Aid.

The term aid is used in two senses in the Navy: in a generic sense as meaning the officers constituting the personal staff of a flag officer, and in a narrower sense, the aids additional to the flag lieutenant and flag secretary. All these officers are aids to a rear-admiral in the Navy in the same sense as the officers on the personal staff of a major-general in the army constitute his aids within the meaning of the Revised Statutes, sections 1098, 1261.

This is clearly shown by the letter of the Secretary of the Navy embodied in Finding III (Record, pp. 3 to 5), to the whole of which the attention of the court is invited. The Secretary, after referring to the provisions of the regulations quoted in brief for United States (pp. 3, 4) says:

"As in the case of a general officer of the Army, these officers, including the flag lieutenant, are, in every acceptation of the word, aids for assisting the commander in chief in the performance of his duties. The number of officers thus assigned is limited only by the actual necessities of the case. In very large fleets, where the staff

work is especially heavy, two or three so-called aids may be necessary in addition to the flag lieutenant and the secretary. They are all, from flag lieutenant to the lowest aid in point of rank, aids in every sense of the term to the flag officer. The senior aid of the flag officer is, in ninety-nine cases out of a hundred, chosen by the flag officer personally as a flag lieutenant. The term 'flag lieutenant' in itself by no means indicates all the duties which the officer so appointed performs. Different flag officers distribute their duties among the members of the personal staff in different ways. Some have charge of one thing, or set of things, another has charge of other things; but, from time immemorial, in other naval services as well as our own, it has been customary to term the senior aid of the flag officer the 'flag lieutenant' because, from time immemorial also, that aid has been placed in charge, as one of his duties only, of the signal work of the fleet or squadron in which he may happen to be serving."

After a description in detail of the duties of a flag lieutenant, he says (p. 4):

"It will be seen from this that the flag lieutenant is in every respect the aid, peculiarly, of the flag officer, and his duties, in comparison with those of an aid to a general officer, more nearly conform to those performed by a military aid than do those of any other officer on the personal staff of a flag officer."

A comparison of the duties of a flag lieutenant in the Navy as described in this communication, with those of an aid to a major-general in the Army as stated in finding IV, Record, p. 5, fully supports the statement of the Secretary of the Navy just quoted, that the duties of a flag lieutenant "more nearly conform to those performed by a military aid than do those of any other officer on the personal staff of a flag officer."

The reasons also which may be supposed to have influenced Congress in providing an additional rate of pay for

an aid to a major-general apply with full force to the flag lieutenant of a rear-admiral. They are forcibly stated by the Secretary of the Navy in paragraph 5 of his letter (Record, pp. 4, 5). This statement of the Secretary of the Navy constitutes evidence of the highest character as to the understanding and practice of the Navy Department. On all questions of administration it should be conclusive. *Jones* v. *United States*, 137 U. S. 202, 216; *Heath* v. *Wallace*, 138 U. S. 573, 584; *Paquete Habana*, 175 U. S. 677, 696; *Savage* v. *United States*, 1 C. Cls. 170; *Eskridge* v. *United States*, 30 C. Cls. 290, 298. See also Revised Statutes, § 1076.

There is no provision of statute which requires, as contended for the United States (brief, p. 6), that a rear-admiral shall have exactly the same number of aids as a major-general. It is not the organization of the Navy which is assimilated by law to that of the Army, but its pay. The number of officers on the staff of a major-general is fixed by law, that of such officers on the staff of a rear-admiral, by regulation. The law (Personnel Act, section 13, 30 Stat. L. 1007) simply says that when the rank or duties of a naval officer are similar to those of an army officer, he shall receive the same pay.

The appointment of the claimant as flag lieutenant was in strict accordance with the regulations quoted in brief for United States (pp. 3, 4), he being "a line officer not above the rank of lieutenant." So, also, the other aids on the personal staff of a flag officer are required only to be "junior to the flag lieutenant" (Section 345, par. 2, brief for United States, p. 4), though it is a mistake to suppose as does counsel for the United States (foot p. 4 and top p. 5) that such officers could not also be of the grade of lieutenant. This would be perfectly regular provided they were junior to the flag lieutenant as would be any officer of junior commission, even though of the same grade (Revised Statutes, section 1467).

A Substantial Correspondence.

The Personnel Act, § 13 (30 Stat. L. 1007), requires that the pay of officers of the Navy shall be the same as that of "the officers of corresponding rank in the Army." This provision does not require that either the rank or the duty of the officers be described by the same names; for if so, the act would be impossible of application. No rank in the Navy is described by the same name as that of the officer of corresponding rank in the Army. Neither are the duties of an officer described by the same terms in the Navy as those of an officer in the Army. For a recovery of the pay herein claimed it is not necessary that a flag lieutenant be an "aid" in the sense in which that term is used in the Navy. All that is required is that he occupy a relation to a rear-admiral in the Navy corresponding to that of an "aid" to a major-general in the Army.

It is in this way that the statutes allowing pay to the Army have been applied to the Navy in repeated decisions.

Commutation of quarters is an allowance granted in the Army only to an officer "on duty without troops." The term "troops" is unknown in naval parlance. The few passages of the Navy Regulations which contain the word (Edition of 1905, Articles 296, 1228, 1648, 1649, 1653) use it only as referring to enlisted men of the Army and Marine Corps. Yet the Court of Claims, "applying the laws governing pay and allowances of the Army to the Navy by analogy," has applied the commutation statutes to officers of the Navy. (*Anderson* v. *United States*, 39 C. Cls. 316, 320; *Colhoun* v. *United States*, 41 C. Cls. 31.)

So, too, an army statute allows to "every officer serving with troops operating against an enemy" exercising a command above that pertaining to his grade, the pay and allowances of the higher grade. Here again the

terms used are Army terms which can be applied to the Navy only by analogy; yet the Court of Claims has so applied them and granted the benefits of the act to officers of the Navy. (*Thomas* v. *United States*, 39 C. Cls. 1.)

In *United States* v. *Wallace*, 116 U. S. 398, this court considered a statute providing that United States commissioners should receive "the same compensation as is allowed to clerks for like services." The court quoted with approval (p. 400) the following language of the Court of Claims, 20 C. Cls. 273, 275, and affirmed its judgment:

"The phrase 'like services' does not necessarily mean identical with, for by such a construction the compensation allowed to commissioner 'for any other service' would be defeated because of the subject-matter of the duties of the commissioner and the clerk being somewhat different; but the statute must receive a reasonable construction, and where the service of the clerk bears a substantial resemblance to the duty performed by the commissioner, then, under § 847, the commissioner would be entitled to the compensation allowed by law to the clerk, it being in legal substance a 'like service.'"

So here, it is not necessary that the claimant should have been technically an "aid" to a rear-admiral in the Navy to entitle him to this additional pay of $200 a year. It is sufficient that he occupied a position corresponding to that of an "aid" to a major-general in the Army, to whom alone this provision of Section 1261 of the Revised Statutes applied at the time of its passage. As we have seen, there is a substantial correspondence to the position of such an aid in every particular.

True, a flag lieutenant is even technically known as an "aid" to a rear-admiral as shown by the letter of the Secretary of the Navy (finding 3, pp. 3 to 5). This, however, is not essential.

Absurd Result of Contrary View.

A decision against this claim would mean that the flag lieutenant would receive only the lineal pay of his grade, while the "aid" in the narrower sense of the term, though the junior in rank of the flag lieutenant, would receive, in addition to the lineal pay of his grade, additional pay at the rate of $200 a year. Thus the officer of superior position and duty on the flag officer's staff would receive less pay than his junior in rank performing less arduous and responsible duties.

So to hold would be to contravene the principle laid down by this court in *United States* v. *Farenholt*, 206 U. S. 226, where a very similar contention was made on behalf of the United States which the court thus met (pp. 229, 230):

"In other words, the Government contends it was the purpose of Congress to give the inferior officer the better pay. The Assistant Attorney-General ventures on no explanation of this anomaly, but insists upon the written word. A court is not always confined to the written word. Construction sometimes is to be exercised as well as interpretation. And 'construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text from elements known from and given in the text—conclusions which are in the spirit, though not within the letter of the text.' Lieber, 56. The application of this rule is clear. Consideration of the provisions relative to the rank and pay of officers of the Army and Navy make it evident that Congress used the words 'assistant surgeon' as descriptive of the whole class of assistant surgeons, passed as well as those not passed."

To apply the same principle here, it could not have been within the contemplation of Congress to grant $200 a year additional pay to the lower officers of the personal staff of a flag officer in the Navy while denying it to the flag lieutenant, the chief officer on the staff.

The words of Revised Statutes, section 1261, "aid to major-general," when they come to be applied to the Navy, must be construed to give to the higher aids known as flag lieutenants, at least as much pay as is received by the lower aids who have no other designation than simply as "aids."

Question Settled by* Crosley *Decision.

But the question is not an original one. It is settled by the decision already rendered by this court in *United States* v. *Crosley*, 196 U. S. 327. Crosley was flag secretary and not an "aid" in the narrower sense herein contended for by the United States. That fact appeared in the record of the case. It contained an official statement signed by the Secretary of the Navy, "that it appears from the records that claimant was, during the period from May 16, 1899, until September 8, 1900, a lieutenant (junior grade) in the United States Navy, and served on the staff of Rear-Admiral J. C. Watson, *as flag secretary.*" (Printed transcript of record, *The United States, Appellant*, v. *Walter S. Crosley*, No. 96 of October Term, 1904, foot of p. 5.)

If, as contended in this case, a flag lieutenant is not entitled to aid's pay, neither is a flag secretary. This court, however, held that a flag secretary is entitled to aid's pay. It therefore necessarily follows that a flag lieutenant is also entitled.

Longevity on Pay as Aid.

Statutes and Construction Thereof.

The provisions of the Revised Statutes giving longevity pay are as follows:

Revised Statutes, § 1261:

"The officers of the Army shall be entitled to the pay herein stated after their respective designations:

* * * * * * *

"Captain, not mounted: eighteen hundred dollars a year.

* * * * * * *

"Aid to major-general: two hundred dollars a year, in addition to pay of his rank."

Revised Statutes, § 1262:

"There shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years of service."

These provisions were construed in *United States* v. *Tyler*, 105 U. S. 244. The question in that case was whether the longevity increase was to be computed upon the total pay received by an officer, including previous longevity increases; thus computing one longevity increase upon another. The court held that it was to be so computed, and that no other construction would satisfy the terms of the statute "current yearly pay."

The following from the conclusion of the opinion shows the exact point involved (105 U. S. 246):

"We also hold that the words 'current yearly pay,' in section 1262, require that, when the increased pay for any period of five years is to commence, the ten per cent must be counted on the regular salary added to its increase by any previous periods of five years; so that the original salary of the rank, and any additions of ten per cent previously earned for periods of five years, constitute the current yearly pay on which said ten per cent is to be calculated."

This decision was rendered March 13, 1882 (17 C. Cls. 437).

Evidently in consequence of this decision, Congress, at the same session, passed the following amendment, June 30, 1882:

"That from and after the 1st day of July, 1882, the ten per centum increase for length of service allowed to certain officers by Section 1262 of the Revised Statutes shall be computed on the yearly pay of the grade fixed by Sections 1261 and 1274 of the Revised Statutes." (22 Stat. L. 118.)

The contention on the part of the United States is that the longevity increase is to be calculated only on the $1,800 a year fixed by Section 1261 as the rate of pay for a captain not mounted, in the Army. The claimant contends that it is also to be calculated upon the $200 a year fixed by the same section for an aid to a major-general.

If the case depended on the original sections of the Revised Statutes, there could be no question of the right to a computation of ten per cent increase on the $200 a year additional pay as aid. The longevity is "ten per centum of their current yearly pay." It is too clear for argument that the $200 a year received by the aid to the major-general is just as much a part of his "current yearly pay" as the $1,800 which he receives as captain, not mounted.

Did Congress in the passage of the act of 1882 intend to make a change in this respect?

It is always allowable in construing a statute, to take into account the history of the times, and the circumstances which may be presumed to have led to the enactment of the statute. (*United States* v. *Union Pacific Railroad*, 91 U. S. 72, 79.) We are also told by Blackstone that it is important to bear in mind the old law; the mischief or defect, which existed in the old law; and the remedy which the legislature has thought proper to apply by the new statute. (Blackstone's Commentaries, Book 1, p. 87; see also p. 60.)

In this instance, we know exactly what the defect was in the old statute. The longevity pay was, so to speak,

compounded. The officer, during his first five years, received his grade pay as fixed by section 1261 of the Revised Statutes. During his second five years he received that grade pay increased by ten per cent thereof. During his third five years he received not only the grade pay and two ten per cent increases thereon, but also ten per cent increase on the first longevity increase received during the previous five years. Congress was not willing that this liberality in the computation of longevity increases should continue. The provision of the act of 1882 was intended to obviate the result reached by this court in the construction of Section 1262, and to restrict the computation of the longevity increase to the grade or basic rates of pay fixed by Section 1261 without also computing them upon the previous longevity increases of which the officer was already in receipt. With this view Congress provided by that act that the basis for computing the longevity increase, instead of being as fixed by the previous law "current yearly pay," should be "the yearly pay of the grade."

But the act of 1882 does not merely provide a basis of computation. It defines the term used. The words are "the yearly pay of the grade fixed by Sections 1261 and 1274 of the Revised Statutes." Thus, the rates of pay fixed by Section 1261 are declared to be the rates which Congress had in mind in restricting the computation of the longevity increase to "the yearly pay of the grade." "Yearly pay of the grade," as the term is used in this act, was clearly employed by Congress as synonymous with "grade pay"; a very common term to denote the original pay fixed by Section 1261 as distinguished from longevity pay. If it were held that the right to longevity pay on the $200 a year aids' pay fixed by Section 1261, was taken away by the act of 1882, the result would be that Congress, in legislating to take away one thing which

it had specially in mind, inadvertently took away another not called to its attention.

It is clear, therefore, that the longevity increase in this case has been properly calculated upon the aid's pay of $200 as well as upon the army pay of a "captain, not mounted," of $1,800.

Decisions of this Court.

This view is in accordance with the spirit of the decision of this court in *United States* v. *Mills*, 197 U. S. 223, construing the term "pay proper." There the court said (p. 227):

"'Current yearly pay and 'pay proper,' as used in the sections, mean the regular, ordinary pay which an officer may be entitled to under the facts in his case, and if, by virtue of length of service, he is entitled to receive the compensation provided for in section 1262, that compensation is his 'pay,' or his 'pay proper,' as distinguished from possible other compensation by any allowances, or commutation, or otherwise."

It is directly supported by the decision in *United States* v. *Crosley*, 196 U. S. 327. The judgment in that case included longevity pay on his pay as aid (196 U. S. 328). The opinion of this court, after an elaborate consideration of the case, concludes:

"The judgment of the Court of Claims is modified, disallowing the sums claimed in the petition and carried into the judgment on account of mounted pay and longevity pay based thereon, and as modified, is affirmed."

This direct exclusion of longevity pay on mounted pay emphasizes the inclusion of longevity pay on aid's pay. It is no answer to say, as is said in the able brief for the United States (p. 12) that "This seems to have been an inadvertence." It is to be presumed that this court con-

sidered all points properly before it in the record, and this is especially so when one item of longevity pay allowed by the Court of Claims is stricken out while another is allowed to stand, thus impliedly approving the allowance of the latter item.

As was said of similar circumstances in regard to another decision of this court, "In the Supreme Court, also, the alterations were mentioned with the other facts of the cases. Necessarily they constituted a factor in the decision." (*Brown* v. *United States*, 20 C. Cls. 416, 520.)

And in *Gila Reservoir Co.* v. *Gila Water Co.* 205 U. S. 279, 284:

"A failure to make a defense by a party who is in court is, generally speaking, equivalent to making a defense and having it overruled."

Manual of Pay Department.

It is suggested in the brief for the United States (p. 7) that in several editions of the Manual for the Pay Department of the Army it is laid down that aid's pay is "not to be included in computing the service increase." This manual is little more than a compilation of existing rulings and decisions. It can not put an authoritative construction on the law. The passage in question was inserted in it prior to the recent decisions of this court in *United States* v. *Crosley*, 196 U. S. 327, and *United States* v. *Mills*, 197 U. S. 223. In the last edition of that manual, that of 1907, paragraph 478, the following sentence from the opinion of this court in the *Mills* case, 197 U. S. 223, 227, is quoted:

"'Pay proper means the regular ordinary pay which an officer may be entitled to under the facts in his case, and if by virtue of length of service he is entitled to receive the compensation provided for in section 1262, that compensation is his pay, as distinguished from pos-

sible other compensation by any allowances, commutation, or otherwise.'"

This quotation is followed by this—

"Note.—Under the above, foreign-service pay should be computed on the highest grade held, including longevity pay, *pay as aid*, as acting commissary, etc."

If, as here held, the ten per cent increase for foreign service allowed by the act of June 30, 1902, 32 Stat. L. 512, is to be computed on pay as aid, why should not increase for longevity also be computed on pay as aid?

The logical result of the decision in the *Mills* case as well as the direct holding in the *Crosley* case requires aid's pay to be included in the computation of the longevity increase. It has been so held by the Court of Claims in this case, not only upon the authority of the *Crosley* case, but upon the independent reasoning of that court to which the attention of this court is respectfully invited.

Conclusion.

In conclusion we quote as an able exposition of the general purpose of Congress in the enactment of the Personnel Act, the concluding paragraph of the opinion of the Court of Claims delivered by Judge Howry, May 15, 1907, in the case of *Cromwell* v. *United States* (will appear in 42 C. Cls.; as yet officially reported only in "Memoranda for the Information of the Officers of the Pay Corps," etc., published by Bureau of Supplies and Accounts, Navy Department, No. 78, September 1, 1907, p. 439):

"There are anomalies in the Navy Personnel Act as amended which have led to some confusion in construction. Thus, in *Farenholt* v. *United States* (41 C. Cls. R. 517) it was contended by the Government that it was the purpose of Congress to give the inferior officers the better

pay. No explanation of this inconsistency was offered by the Government, which contemporaneously with this decision seems to have been noticed by the Supreme Court affirming Farenholt's case (206 U. S. 226). Other cases growing out of the Personnel Act, and which have caused some confusion, might be noticed, but no useful purpose can be served by making more than a general reference to the cases in this and in the court of last resort, inasmuch as these cases establish a general purpose by the passage of the Personnel Act to raise deficiencies in the pay of naval officers rather than to decrease the compensation previously fixed for duties peculiar to the sea and marine service."

Following the general purpose thus stated and the line of reasoning of this court in the *Crosley*, *Farenholt* and *Mills* cases hereinbefore referred to, it is submitted:

1. That the appellee having served on the personal staff of a flag officer in the Navy and having performed duties in every respect analogous to those of an aid to a major-general in the Army, is entitled to the same pay as such aid.

2. That in computing such pay he is entitled to have his increase for length of service computed not only upon the basic pay of his lineal rank of lieutenant, but also upon his additional pay as aid.

The judgment of the Court of Claims should be affirmed.

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